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No. 87-245

In The
Supreme Court of the United States
October Term, 1987

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES,

Petitioner,

v.

JEANNE A. JORDAN,
on behalf of herself
and all others similarly situated,

Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. Respondents accept the Secretary's characterization of Question 1.

2. Respondents reject the Secretary's version of Question 2. It should be restated in its entirety as follows: Whether the Secretary properly appealed from the Jan. 18, 1985 district court ruling denying the Secretary's Rule 60(b) motion for relief from judgment.

PARTIES TO THE PROCEEDINGS

The named respondents are correctly named and described in the Secretary's Petition for Writ of Certiorari.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
STATEMENT OF THE CASE	2
THE COURT SHOULD DENY THE PETITION FOR CERTIORARI	8
CONCLUSION	13

TABLE OF AUTHORITIES

Page

CASES:

Aune v. Reynders, 344 F.2d 835 (10th Cir. 1965) 7, 9, 10

Bradley v. School Board of City of Richmond, 416 U.S. 696 (1974) 12, 13

Browder v. Director, Department of Corrections of Ill., 434 U.S. 257 (1978) 11

Jordan v. Bowen, 808 F.2d 733 (10th Cir. 1987) 7, 8

Jordan v. Heckler, 744 F.2d 1397 (10th Cir. 1984) 4, 6

Jordan v. Schweiker, 79-994-W (W.D. Okl.; March 17, 1983) 3

Mathews v. Eldridge, 424 U.S. 319 (1976) 3

Miree v. DeKalb Co. Ga., 433 U.S. 25 (1977) 11

CONSTITUTION, STATUTES AND RULES:

U.S. Const. Amend. V (due process clause) 3

Title 28, United States Code

§ 1252 2

§ 2107 ..... 10, 11

Title 42, United States Code

§ 405(a) 3

§ 405(b) 3

§ 405(j) 3

§ 1383(a)(2) 3

§ 1383(c)(1) 3

§ 1383(e)(1)(A) 3

TABLE OF AUTHORITIES—Continued

Page

Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1794 ..... *passim*

Federal Rules of Appellate Procedure,

Rule 4(a) 10, 11

Federal Rules of Civil Procedure,

Rule 60(b) ..... *passim*

Rule 60(b)(6) 6, 9

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Respondents, a nationwide class of Social Security and Supplemental Security Income beneficiaries, respectfully request that the Secretary's petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit be denied.

OPINIONS BELOW

The opinion of the court of appeals dismissing the Secretary's appeal in its entirety is reported at 808 F.2d

733. It is also included in the Secretary's Consolidated Appendix (hereinafter, Sec. App.), at pp. 56a-62a. That court's subsequent order denying the Secretary's Petition for Rehearing is unreported. (Sec. App., at 73a)

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JURISDICTION

Respondents unequivocally reject the Secretary's assertion that issues raised in his petition are already before this Court by operation of the second paragraph of 28 U.S.C. § 1252. Respondents have thoroughly discussed the lack of jurisdiction under Section 1252 in the related direct appeal (87-230). Those arguments are contained in respondents' Motion to Dismiss or Affirm, pp. 9-15, and are incorporated here by reference.

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STATEMENT OF THE CASE

As this Court is aware, the Secretary has previously filed a related appeal in this case (87-230). Respondents submitted a detailed statement in their Motion to Dismiss or Affirm describing the complex history of proceedings and rulings in the district court and court of appeals as well as the resulting procedural posture of the Secretary's appeal. That statement is incorporated here by reference.

The Secretary's Statement, as contained in his petition, does not sufficiently elaborate on relevant orders and

events. Respondents submit the following additional Statement relevant to this Court's inquiry into the instant petition.

1. Plaintiffs initiated this action on September 7, 1979, in order to challenge the Social Security Administration's failure to monitor or otherwise effectively supervise individuals who act as representative payees for the receipt and disbursement of Social Security and Supplemental Security Income benefits. Plaintiffs' claims were premised upon 42 U.S.C. §§ 405(a), (b), (j), 1383(a) (2), (c) (1), and (e) (1) (A), and the Due Process Clause of the Fifth Amendment. Of particular significance here was the contention that the government had violated their constitutional rights by failing to implement a mandatory accounting system to determine if representative payees were carrying out their statutory duty to spend benefits solely for the use of beneficiaries including elderly, disabled, and child recipients.

By Order dated March 17, 1983, the district court rejected the Secretary's contention that the Social Security Administration (hereinafter SSA) had no obligation to require accountings by all payees. *Jordan v. Schweiker*, 79-994-W (W.D. Okl., March 17, 1983). (Sec. App., at 23a-40a) In granting summary judgment, the district court held that the Secretary was required by the Due Process Clause of the Fifth Amendment to the U.S. Constitution to institute a mandatory periodic accounting program on behalf of a nationwide class of beneficiaries. (*Id.*, at 37a)

The decision was reached after a thorough evaluation of plaintiffs' Fifth Amendment due process claim under the standards set forth in *Mathews v. Eldridge*, 424 U.S.

319 (1976). (Sec. App., at 37a) The district court found that the interest of beneficiaries in the receipt and proper use of benefits was substantial. Further, it was explicitly held that the risk of beneficiaries being erroneously deprived of benefits under the Secretary's discretionary procedures was great and the probable value of mandatory payee accountings substantial. (*Id.*) The Secretary at no time argued that any particular group of payees should be exempted under the balancing test. The Secretary was ordered to implement mandatory periodic accounting procedures nationwide *within one year of the order. (Id.)*

On May 10, 1983, the Secretary filed a notice of appeal from that order exclusively on the accounting issue, but later voluntarily moved to dismiss the appeal. The Tenth Circuit Court of Appeals granted the Secretary's motion and on July 14, 1983, dismissed the accounting appeal. *Jordan v. Heckler,* 83-1600. (See Supp. App., attached to Motion to Dismiss or Affirm, at 1a.) Once again, the Secretary has omitted any reference to, or discussion of, this significant order of dismissal.

Rejecting the government's subsequent appeal of a district court award of attorney fees, Judge Seth, writing for a unanimous panel, specifically noted that the "Secretary did not appeal the trial court's order as to accountings and indicated that ". . . he agreed with it." *Jordan v. Heckler,* 744 F.2d 1397, 1401 (10th Cir. 1984). (Sec. App., at 71a) Consequently, as of July 1983, the law of this case was that the Social Security Administration was required by due process of law to conduct "mandatory periodic accountings" for all members of the nationwide class of beneficiaries. (See appellees' Motion to Dismiss or Affirm, pp. 15-20)

As the Secretary concedes in his Petition, he purported to implement the 1983 final judgment through a random survey of only ten percent of payees annually rather than mandatory periodic accounting by all payees. On February 1, 1984, after defendant refused several demands by plaintiffs to establish mandatory accounting procedures for all payees, plaintiffs filed a Motion for Order Enforcing Judgment.

By order dated March 26, 1984, following extensive briefing and a lengthy evidentiary hearing, Judge West explicitly reaffirmed plaintiffs' contention that the due process rights of beneficiaries, as established by the March 1983 final judgment, could only be protected by universal annual accountings. (Sec. App., pp. 41a-43a) Judge West ordered the Secretary to take "immediate steps" to implement such a system. (*Id.*, at 43a) Further, the court ordered SSA to maintain reasonable methods for verifying information submitted by representative payees. Specifically, SSA Form 623 was approved as the primary accounting form. Only essential information verifying living arrangements and a general statement that benefits were used for the beneficiary's current needs are requested via the form. (*Id.*, at 42a, 43a) Only upon certain events would a more detailed accounting be required.

Upon the Secretary's motion, the court later amended its order to allow SSA to monitor state institutional payees through its On-Site Review Program. (*Id.*, at 44a-47a) However, the amended order of July 2, 1984 was express-

ly conditioned on each institution being monitored at least once every three years. (*Id.*, at 46a, 47a)

The Secretary did not argue or present evidence supporting the proposition now presented on appeal that certain categories of payees should be completely excluded from having their actions reviewed by SSA. More specifically, the Secretary presented no evidence whatsoever to support a presumption that spousal or parental payees with custody of beneficiaries should be treated any differently from other payees. As noted in appellees' Motion to Dismiss, the Secretary's original proposal calling for a 10% random sample, which was rejected by the court in its March 26, 1984 order, included spousal and parental payees in the sample. (Appellees' Br., at 5)

On August 29, 1984, the Secretary filed a notice of appeal from the March 26, 1984 Order as amended. Prior to disposition of that appeal, however, the Secretary filed his initial Motion for Indicative Ruling and Relief from Judgment under Rule 60(b)(6), F. R. Civ. P., arguing that congressional changes required modification of the court's prior judgment.

On January 18, 1985, the district court issued its decision on the Secretary's Rule 60(b) Motion by rejecting the Secretary's demand for relief from judgment. *Jordan v. Heckler*, No. 79-994W (W.D. Okl., Jan. 18, 1985). (Sec. App., at 52a) The court noted that to grant the government's proposed payee exemptions from mandatory accountings would mean that substantial numbers of class members would be left without minimal constitutional protections. (*Id.*, at 54a)

Furthermore, the district court declared that it would "not indefinitely delay termination of the case to allow the Secretary to present evidence which could have been presented at least ten months ago". *Id.* Citing *Aune v. Reynders*, 344 F.2d 835 (10th Cir. 1965) as controlling the disposition of Rule 60(b) Motions, Judge West expressly held that ". . . defendant is not entitled to relief from judgment". (*Id.*, at 48a). The court premised its holding upon the following reasoning:

> The only way by which the Secretary can avoid the mandatory annual accounting is to establish that beneficiaries' due process rights are being adequately provided through some alternative means. . . . However, no such showing has been made for either of the two categories [spousal/parental payees] set out above. Beneficiaries in these two categories have the same rights under the due process clause as do all other beneficiaries for whom representative payees have been appointed.
>
> . . . The Secretary has had several chances to present the necessary evidence and has failed to do so. The Court will not indefinitely delay the termination of this case to allow the Secretary to present evidence which could have been presented at least ten months ago.

(*Id.*, at 54a). Inexplicably, the Secretary chose not to file a notice of appeal from the 1985 order either to this Court or the court of appeals. Rather, he attempted to inject Public Law 98-460, 98 Stat. 1794 (the Social Security Disability Benefits Reform Act of 1984 (hereinafter, the 1984 Amendments)) into his existing appeal of the March 26, 1984 district court order enforcing the judgment.

The Secretary's improvident strategy resulted in an order of dismissal by the court of appeals. *Jordan v.*

Bowen, 808 F.2d 733 (10th Cir. 1987). (Sec. App., pp. 56a-62a) The panel held that the Secretary had effectively abandoned issues and arguments pertaining to the 1984 order. (*Id.,* at 60a) Judge McWilliams, writing for a unanimous panel, held that litigants who fail to present arguments in briefs on appeal will be ". . . deemed to have waived their contention on appeal." (*Id.*)

In discussing the Secretary's appeal in its entirety, the court additionally held that the 1984 Amendments were not properly before that court due to the Secretary's failure to properly invoke the court's appellate jurisdiction by filing a notice of appeal. Thus, the court of appeals refused to hear arguments relating to the district court's Rule 60(b) order. (*Id.,* at 62a)

As this Court is aware, the Secretary subsequently renewed his Rule 60(b) Motion following the order of dismissal. That ruling by the district court, dated April 10, 1987, which denied the Secretary's most recent Motion for Relief from judgment, is the subject of the Secretary's related appeal and Jurisdictional Statement (No. 87-230). Respondents have already fully discussed issues relating to review of that order separately in their Motion to Dismiss or Affirm. That order, however, is not pertinent to the Secretary's instant Petition.

I. THE COURT SHOULD DENY THE PETITION FOR CERTIORARI

1. The Secretary's appeal was appropriately dismissed by the court of appeals. Indeed, the order of dismissal was in full accord with the basic requirements of federal appellate jurisdiction.

The Secretary's appeal was from the district court's 1984 order enforcing judgment. It was during the pendency of that appeal that the Secretary filed his Motion for Indicative Ruling and Relief from Judgment pursuant to Rule 60(b)(6). Subsequent thereto, the district court expressly denied the Secretary relief from judgment which he had specifically requested in his Rule 60(b)(6) motion.

In reviewing the Rule 60(b) motion, the court acknowledged that a notice of appeal usually deprives a trial court of jurisdiction. Judge West stated that a court ". . . does, however, retain jurisdiction to consider how it would rule on a Rule 60(b) motion." (Sec. App., at 51a) Citing *Aune v. Reynders, supra,* the district judge also acknowledged that he could not grant such a motion absent an order remanding the case from the court of appeals. However, he held that the Secretary was not entitled to relief from judgment. (*Id.,* at 52a)

In the *Aune* decision the court of appeals defined the parameters of a trial court's jurisdiction in considering Rule 60(b) motions:

> In ordinary civil cases the rule is that after an appeal has been taken *the district court retains jurisdiction to consider and deny a Rule 60(b) motion,* and, if it indicates that it will grant the motion, the movant may then ask the Court of Appeals to remand the case so that the district court may act. *If the motion is denied, the movant may appeal from the order of denial.*

344 F.2d at 841 (emphasis added). As noted above, the district court premised its jurisdiction and denial of relief on the *Aune* decision. The court of appeals observed that

the language of the Jan. 18, 1985 order may not be technically precise, but that the result ". . . was, and clearly so, to deny the Secretary any relief from judgment". (Sec. App., at 62a)

The Secretary would apparently have this Court accept the curious proposition that an express denial of relief specifically requested in a Rule 60(b) Motion is not an adverse ruling which is final and appealable. Respondents submit that such an interpretation of the January 18, 1985 Order is strained, and ignores both the substance and effect of that decision. The trial judge approriately cited the *Aune* decision as controlling authority for consideration of Rule 60(b) motions.

Rather than filing a protective notice of appeal with this Court, or the court of appeals, based on his dissatisfaction with a clearly adverse ruling, the Secretary simply assumed that it was not an appealable order. It was a fundamental mistake which precluded consideration of that order, and the issues decided therein, by the Court of appeals.

The court of appeals concluded its order of dismissal by stating as follows:

> From our search of the record before us, no appeal was taken by the Secretary from the district court's order of January 18, 1985. Therefore, the correctness of that particular order is not before us by direct appeal and cannot be somehow injected into the appeal from the district court order of March 26, 1984.

(Sec. App., at 62a) The decision comports with standard requirements for perfecting appeals under Rule 4(a), Rule App. Proc., and 28 U.S.C. § 2107. Additionally, this Court has explicitly held that the ". . . [60]-day time limit

is 'mandatory and jurisdictional' " under Rule 4(a) and § 2107. *Browder v. Director, Department of Corrections of Ill.*, 434 U.S. 257, at 264 (1978).

The Secretary's assertion that he was misled or confused about the district court order is without merit. The Secretary ignored universally recognized procedures for perfecting an appeal from a final adverse ruling. If he was not satisfied with the order or was confused he could have protected his claims by timely perfecting an appeal. His unwise decision to forego this step was fatal to any subsequent attempt to raise issues addressed in the Rule 60(b) order through the appellate process.

2. The court of appeals finding that the Secretary abandoned his arguments relating to the March 26, 1984 order enforcing judgment was based upon a careful analysis of the briefs submitted for review. In the Secretary's brief he unambiguously declared that ". . . *the only issue on appeal now* is whether Congress's decision to exempt certain payees from the accounting program satisfies the requirement of Due Process." Def. Br. at 14. (emphasis added) No objections regarding the March 26, 1984 Order were stated. The failure to present arguments in the court of appeals concerning the 1984 order and random sampling precludes review in this Court. *Miree v. DeKalb Co. Ga.*, 433 U.S. 25, 33 (1977).

Notwithstanding his prior statements of record, the Secretary now argues that he did not abandon his appeal on the merits. This Court is asked to conclude that exempting specific categories of payees (parental and spousal) is identical to random sampling. Such reasoning is inherently flawed. Moreover, the Secretary's use of the catchphrase, "less-than-universal", in order to equate his ar-

guments is a semantic trap designed to divert attention from his previous mistakes in strategy.

The Secretary, however, commits a more grievous error in describing the 1984 order as requiring universal accountings for the first time. That order specifically clarified and enforced the 1983 summary judgment. The 1984 order was sought by plaintiffs to insure compliance with the dictates of due process as established in the final *unappealed* 1983 judgment. The question of mandatory universal accountings for all beneficiaries was *res judicata* and controlled by the doctrine of the "law of the case". (See appellees' Motion to Dismiss or Affirm, pp. 15-20) Therefore, those issues were not involved in the appeal of the 1984 order.

3. There is no basis in law or the record to support the contention that the court of appeals was required to review the 1984 Amendments automatically. First, the question of the Act's constitutionality was not before that court for reasons discussed in the preceding paragraphs herein and in those put forth in appellees' Motion to Dismiss or Affirm. Second, the prior decisions of this Court do not require consideration of the congressional amendment.

Bradley v. School Board of City of Richmond, 416 U.S. 696 (1974), cited by the Secretary as authority (Sec. Br., at 12), does not encompass circumstances that are present in this Petition. In that case, the court of appeals had jurisdiction to properly consider an intervening change in statutory law. *Id.* at 710. A notice of appeal had been timely filed from the district court. Therefore, jurisdiction was not an issue as it is here.

Additionally, the issue in *Bradley* concerned the propriety of a fee award while ". . . pending resolution on appeal when the statute became law." *Id.* The instant appeal by the Secretary is distinguishable because constitutionally mandated periodic accountings had become final by virtue of the 1983 district court judgment. Conversely, the inquiry in *Bradley* involved attorney fees still under "direct review." *Id.*

The Secretary has not stated sufficient reasons in his petition to warrant review. As the preceding discussion demonstrated, there are no issues of constitutional dimension or of major public interest that are properly before this Court. The procedural posture of this appeal precludes review of the constitutional validity of the 1984 Amendments as demanded by the Secretary.

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CONCLUSION

The Court should deny the Petition for Writ of Certiorari for the reasons stated.

Respectfully submitted,

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